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# Landowner and Landlord Liability for the Nuisance-Causing Actions of Third Parties on the Landowner/Landlord's Land: an Analysis of *Brumby v Octavia Housing*

Ian Loveland

CITY UNIVERSITY LAW SCHOOL AND ARDEN CHAMBERS

## Introduction

If one is an academic lawyer who also runs a practise at the bar, then one of the more satisfying elements of that dual identity is to write an article in an academic journal which either questions and criticises a prevailing assumption; to receive some complimentary comments on the paper from several solicitors; to find out that when a client walks through the one of those solicitors' doors with the problem you discussed the solicitor concerned remembers the paper, and then briefs you to run the case which you then argue successfully in the county court and on appeal.

From a personal perspective, that is perhaps what makes *Brumby v Octavia Hill Housing Trust*<sup>1</sup> a memorable case. But the judgment—and conduct of the litigation which led to the judgment—also raises two issues of rather more general interest and significance. The first issue is that the case re-states what ought to have been the perfectly clear current state of the common law with respect to landowner/landlord liability for the nuisance-causing actions of third parties on the landowner/landlord's land. The second issue is that the clarity of the law was at a practical level perhaps being substantially misunderstood and/or misrepresented by many housing lawyers.

## *A clear rule of common law? Landlords cannot be liable in nuisance to neighbours for nuisance caused by the anti-social behaviour of the landlord's tenants*

There is a prevailing assumption among English housing lawyers that landlords simply cannot be liable in nuisance to their tenants or to owner-occupiers for the anti-social behaviour of other tenants. The assumption is usually supported with reference to two relatively recent Court of Appeal authorities; *Mowam v Wandsworth LBC*<sup>2</sup> and *Hussain v Lancaster CC*.<sup>3</sup>

The claimant in *Mowam* lived in a ex-council flat (which she had bought) in a converted house. Her upstairs neighbour, a tenant of the local authority, had psychiatric problems which led her to be an extraordinarily unpleasant person to live close to. She was constantly noisy and abusive, and in short made Mrs Mowam's life a misery for several years.

Ms Mowam could obviously have sued the neighbour in nuisance, or perhaps brought an action under the Protection From Harassment Act 1997. But those would have been futile remedies. The neighbour had no money to pay damages, and there was a very large question mark as to whether a court would even grant still less enforce an injunction against her given her state of health. Mrs Mowam therefore sued the

<sup>1</sup> *Brumby v Octavia Hill Housing Trust* [2010] EWHC 1793 (QB).

<sup>2</sup> *Mowam v Wandsworth LBC* (2001) 33 H.L.R. 56 CA.

<sup>3</sup> *Hussain v Lancaster CC* [2000] Q.B. 1 CA.

neighbour's landlord in nuisance, her argument being that the council was liable to her because it had not taken any steps to end or ameliorate the nuisance.

Mr Hussain had the great misfortune to own a corner-shop and flat in a neighbourhood containing a very large number of white racist thugs, who subjected him to an appalling campaign of violence and abuse. Some of the perpetrators were evidently council tenants or people who resided with such tenants. Others were visitors to people who lived on the estate. Mr Hussein too sued the local authority, both in nuisance and negligence for failing to take effective steps to stop the problem.

Both claimants failed. And they failed because—according to the prevailing assumption—a landlord simply cannot be liable to a neighbouring occupier for the nuisance-causing activities of its tenants or other third parties unless the claimant can prove that the landlord/landowner actively participated in or encouraged the nuisance causing behaviour.

## Questioning and critiquing the prevailing assumption

This author wrote two articles in 2005 which were published in this journal which analysed this area of the law.<sup>4</sup> In the second article, I had indulged my academic's prerogative and argued that the rule in *Mowam* was undesirable as a matter of policy and poorly founded as a matter of law, and ought to be overturned as soon as possible.

The first paper was rather less ambitious. What I tried to do in that article was warn against the danger of *Mowam* and *Hussain* being lent an exaggerated reach which would obscure some really quite basic principles of land and tort law. In particular, I wanted to make the point that in order to be good law in a formal sense *Mowam* and *Hussain* both had to be read in a way which was consistent with the by then venerable but apparently sometimes forgotten—at least by housing lawyers—judgment of the House of Lords in *Sedleigh-Denfield v O'Callaghan*.<sup>5</sup>

*Sedleigh-Denfield* is a case which most law students will have encountered when studying tort law. What *Sedleigh-Denfield* established—overturning previous authority<sup>6</sup>—was that a landowner (L) who knows that third party (T) is using land of which L is in possession in a way that causes a nuisance to a neighbour (N) will be liable in nuisance to N for any loss caused to N by T if either: (i) L encouraged or participated in T's actions; or (ii) L “continued” or “adopted” the nuisance, by which is meant that L did not encourage or participate in T's actions, but knew about them and did not take such steps as were reasonable in the circumstances to stop them.<sup>7</sup>

From a *Sedleigh-Denfield* perspective, the crucial initial question is not “Who caused the nuisance?”; but “Who is in possession of the land where the nuisance comes from?”. One needs perhaps to be alert to the very expansive sense in which “land” is being used here. In a block of flats for example, a communal doorway, a staircase, a lift, an external entrance area or a shared garden are all likely to be land in the possession of the landlord and so potential sources of *Sedleigh-Denfield* nuisance.

<sup>4</sup> Ian Loveland, “Landlord liability for anti-social behaviour of their tenants 1: stretching the orthodox position” (2005a). *Journal of Planning and Environmental Law* 273–282; Ian Loveland, “Landlord liability for anti-social behaviour of their tenants 2: Challenging the orthodox position” [2005] J.P.L. 405–418.

<sup>5</sup> *Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions)* [1940] A.C. 880.

<sup>6</sup> *Job Edwards v Birmingham Navigations Proprietors* [1924] 1 K.B. 341.

<sup>7</sup> The most pertinent passages are per Viscount Maugham in *Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions)* [1940] A.C. 880 at 894: “The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g. by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words ‘continues or adopts’ are defined. In my opinion an occupier of land ‘continues’ a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so”; per Lord Atkin at 897: “It seems to me clear that if a man permits an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it, he is permitting the nuisance to continue; in other words he is continuing it.”; and per Lord Wright at 904–905: “Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects ... This rule seems to be in accordance with good sense and convenience”.

The nature of the nuisance in *Sedleigh-Denfield* was physical damage to land; specifically flooding which resulted from an action of a trespasser who had blocked a culvert on the defendant's property. But the principle has on several subsequent occasions been expressly applied to "human behaviour" nuisance, including inter alia littering, polluting, excessive noise and—perhaps most prosaically—the blocking of designated parking spaces.<sup>8</sup> The basic point made in all these cases is that a nuisance action is concerned with the impact that something on or emanating from D's land has on C's user of her land. Whether the something be a flood, a fire, a rock concert, a group of drug-dealers or a bunch of rowdily obnoxious teenagers is of no significance.

Subsequent authority has also clarified the nature of *Sedleigh-Denfield's* "reasonableness" test. In assessing if a given response would have been reasonable, the court will evaluate such matter as, inter alia, the gravity and duration of the nuisance, the costs of removing or reducing it, the relative financial resources of the parties.<sup>9</sup> The reasonableness test in this context is a remarkably broad one, and belies any suggestion that one is here in the realm of a strict liability tort.

*Mowam* did not seem to be a *Sedleigh-Denfield* case. Mrs Mowam lived in a flat in a converted house. The only land in close proximity to her flat which was in the possession of the landlord would have been the front garden area, and the communal hallway and staircase. It did not seem that any of the nuisance came from those areas. It all came from the behaviour of the other tenant in the other tenant's flat.

But if the nuisance had emanated from land still in possession of the landlord (the gardens, the stairwell or the hallway), then the *Sedleigh-Denfield* test as to the source of the nuisance would be met. As indeed it would be met if the nuisance had been caused not by another tenant of the landlord but by trespassers on the relevant land or bare licencees who were visiting the premises. Questions as to liability would then turn on whether and for how long the landlord had known of the problem and whether the landlord could have taken reasonable steps to stop it.

Mrs Mowam failed because she was trying to change the law. She was trying to turn nuisance into a tort about the relationship between people per se rather than about the relationship between people's land. She was almost one might think—although the point was not clearly put to the court—seeking to bring landowners within the reach of the *Hedley-Byrne*<sup>10</sup> special relationship principle vis a vis their neighbours.

*Hussain* is rather more messy conceptually and—with respect as we say—it was not reasoned and perhaps not pleaded very clearly. The local authority certainly knew about the anti-social behaviour, and had not in Mr Hussain's view done enough to try to stop it. It also seems that that all of the behaviour concerned there came from land which was "in the possession" of the local authority in a strictly formal sense. But one must perhaps regard use of the term "in the possession of the local authority" guardedly, because the land concerned was the public roadway and pavements which permeated the housing estate where Mr Hussain's shop was located.

*Sedleigh-Denfield* does not appear to have received much attention in *Hussain*, but one must assume that the Court of Appeal was aware of the case and structured its reasoning accordingly. There are perhaps two ways in which *Hussain* can be squared with *Sedleigh-Denfield*.

The first is that we can properly draw in a pure doctrinal sense a distinction for nuisance purposes between land over which there is presumptively a constant right of public access (as in the housing estate where Mr Hussain's shop was located) and land which is presumptively private. The second, and perhaps better explanation, shades into the first, and is that it very much more difficult to argue that there is any "reasonable" way for a landowner to control the behaviour of third parties on a public highway, albeit

<sup>8</sup> e.g. *Page Motors v Epsom and Ewell BC* [1982] J.P.L. 572; *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 E.G.L.R. 44; *Lippiatt v South Gloucestershire CC* [2000] Q.B. 51 CA; *Winch v Mid-Bedfordshire DC* unreported, July 22, 2002) and the discussion in S. Bright "Landowner's responsibility in nuisance for anti-social behaviour" (2003) *Conveyancer and Property Lawyer* 171.

<sup>9</sup> See especially *Goldman v Hargrave* [1967] 1 A.C. 645 PC per Lord Wilberforce at 663; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485.

<sup>10</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465.

that the council was strictu sense the “owner” of the highways concerned. The “reasonableness” argument acquires more force in the specific context of *Hussain* because much of the problematic behaviour manifestly amounted to criminal (and often seriously so) activity, which might readily be thought to be the province of the police and the criminal law rather than local authority and the civil courts.<sup>11</sup>

The extension of the *Sedleigh-Denfield* principle to human behaviour nuisance was fiercely criticised by Professor Bright in a paper published in the in 2001 paper entitled “Liability for the bad behaviour of others”.<sup>12</sup> The gist of her argument was that liability should only arise on proof of “fault” in a positive rather than negative sense:

“The fundamental criticism of applying the ‘continuation principle’ taken from *Sedleigh-Denfield* to bad behaviour cases is that ignores the fact that the nuisance creators are autonomous third parties for whom the property owner has no legal responsibility.”

Professor Bright perhaps falls here into the trap of characterising nuisance as a tort about people rather than about land. It might also be suggested that she is using the title of the argument rather than its substance to make her case. The substantive issue is really:

“Landowner liability for nuisances emanating from the Landowner’s land which are caused by third parties and known about by the landowner.”

The policy argument in favour of imposing such liability is relatively straightforward, particularly in the context of residential premises and especially so in high density residential areas. The landowner manifestly can derive a benefit from her land. An obvious example would be a communal front and rear garden surrounding a block of flats which lessees of the flats are given bare licence to use. The gardens add to the aesthetic and functional value of the flats even though they are not part of the demised premises, and as such enable the landowner to charge a higher rent for the flats. Were the landowner to inform prospective clients that in the event that third parties came into the gardens and caused a severe and recurrent nuisance to the occupiers of the flats the landowner would do nothing to stop it, the market value of the flats would presumably decline. More prosaically, communal hallways, staircase and lifts are essential to occupancy of the flats and as such are an integral part of the rental value. Tenants pay to use them, and presume such payments includes a proviso that the areas will be nuisance-free. That the landowner should be liable to her/his tenants for the deleterious effects of third party nuisance in such areas is hardly a radical proposition.

## Terri Brumby’s claim

Terri Brumby had been having difficulties with her accommodation for some time; for four years in fact. She eventually approached Simon Marciniak, the senior housing solicitor at the London firm of Miles and Partners. Simon had read the pieces I had written and briefed me to argue the case. In the subsequently issued Particulars of Claim, we identified Terri’s problem in this way:

- “1. This is an action brought by the Claimant against the Defendant for nuisance ...
2. The Claimant resides at a flat known as Flat 6, Cartwright House. The premises are a 1 bedroom lower ground floor flat.
3. The Claimant occupies the premises as the assured tenant of the Defendant, under the terms of an assured tenancy granted on 19.07.1996.

<sup>11</sup> The case attracted little academic analysis. For an exception see the helpful discussion in J. O’Sullivan (2000) “Nuisance, local authorities and neighbours from hell” *Cambridge L.J.* 11.

<sup>12</sup> Professor Bright, “Liability for the bad behaviour of others” (2001) 2 *Oxford Journal of Legal Studies* 311.

4. Cartwright House is a purpose built, low rise block of flats, believed by the Claimant to have been built in the early 20th century.
5. The Claimant's flat is at basement level. Entry to the block for all flats in the Claimant's section of the building is through a single communal door, immediately adjacent to and a few feet higher than the Claimant's flat. There is a communal hallway and stairwell inside the entrance door. The Claimant's flat is situated on the northern side of the communal staircase.
6. Immediately outside the window of the reception room in the Claimant's flat is a paved area 3 feet wide, which runs to a ledge some 2 feet high and 3 feet wide, which ledge runs along width of the Claimant's flat. (The paved area and ledge are hereafter referred to as 'the trench'). There is no gate/fence/hedge etc obstructing or preventing access to 'the trench', nor has there been any such barrier at any time since the Claimant began to reside at flat 6.
13. The Defendant is believed by the Claimant to have retained possession throughout the relevant period of the footpath from the public pavement to the entrance to the block of flats, of the external entrance area, of the internal communal hallways and staircase, and of 'the trench' outside the Claimant's flat.
18. At some point prior to August 2000, the Defendant granted a tenancy of flat 14 Cartwright House to a Ms Hazel Walker ....
19. Flat 14 is situated on the 4th (top) floor of the block, on the southern side of the communal staircase.
20. The Defendant was granted a possession order against the said Ms Walker in respect of flat 14 in the Lambeth County Court on 09.08.2000.
22. From September 2003 until May 2007, the Claimant suffered substantial and repeated interference with the quiet enjoyment of her home as a result of the failure of the Defendant to prevent a nuisance to the Claimant's premises emanating from land which the Defendant owned and in respect of which the Defendant had possession. The said nuisance was the activities of visitors to Ms Walker's flat.
23. **The source and nature of the nuisance**

The aforesaid nuisance-causing activities emanated from land of which the Defendant was the owner and has always retained possession; namely the external entrance area, the communal hallway and staircases, and 'the trench'...

24. The aforesaid nuisance-causing activities are too numerous to particularise in their entirety, but include the following instances:

(i) **PARTICULARS**

Visitors to Ms Walker repeatedly stood outside the block in the external entrance area and shouted loudly up to flat 14 seeking to alert Ms Walker to their presence so that she could throw down keys to them from her living room window. Such visits and shouting took place at all times of the day and night.

- (ii) On occasions when Ms Walker was not present in her flat or did not hear her prospective visitors, the said visitors would repeatedly ring the door buzzer of the other flats in the block, including that of the Claimant, seeking entry to the block.
- (iii) On repeated occasions when the said visitors could not secure entry to the block, one or more of the said visitors would wait for protracted periods in 'the trench' outside the Claimant's flat. The said visitors entered and remained in 'the trench' qua trespassers on the Defendant's land. When in 'the trench', the said visitors would stare into the Claimant's reception room in a manner which the Claimant

found unnerving and threatening to the extent that she felt compelled always to keep her windows shut and locked. On occasion, including during night time hours when the Claimant was asleep, the said visitors would bang on the Claimant's window demanding to be let into the block.

- (iv) On occasions when Ms Walker was not at home, visitors to Ms Walker's would seek to and did push past the Claimant when she sought to enter or exit the block.
  - (v) Visitors to flat 14 repeatedly made large amounts of noise when moving through the communal hallways and up the staircase.
  - (vi) Visitors to flat 14 repeatedly left litter in the communal hallways and on the staircase and outside the entrance to the block.
  - (vii) On occasions when one or more of the said visitors had secured access to the block but Ms Walker was not at home, one of or groups of the said visitors would remain in the communal areas smoking and drinking alcohol.
  - (viii) While in the communal areas of the block, some of Ms Walker's visitors were repeatedly abusive and threatening towards the Claimant and other residents of the block.
  - (ix) In the period late February to early March 2005, the police were repeatedly called by the Claimant to attend the block because of the alarm and distress caused to the Claimant by the behaviour of visitors to flat 14.
  - (x) Visitors to flat 14 frequently left the front door to the block open in order to facilitate access for other visitors to flat 14, thereby compromising the security of the block.
  - (xi) Visitors to flat 14 on occasion intercepted the Claimant's mail; (mail to all the flats being delivered through a single slot in the front door to the block and thence falling to the floor of the communal hallway).
25. The activities of Ms Walker's visitors were of such a nature as to amount to a nuisance to the Claimant, in that their effect was to detract substantially from the amenity of the Claimant's flat throughout the period from September 2003 to May 2007 ...
26. The Defendant, being the owner of and in possession of the land from which the nuisance to the Claimant's land emanated, is liable to the Claimant in nuisance ... for loss of amenity caused to the Claimant's land by the said nuisance if the following conditions are met:
- (a) The Defendant knew of the continuing, recurrent nature of the nuisance; and
  - (b) The Defendant failed to take such steps as were reasonable in the circumstances to bring the nuisance promptly and effectively to an end.
28. **As to (a) above:**
- Beginning in September 2003, and on occasions thereafter too numerous to particularise throughout the period until May 2007, the Claimant repeatedly made her concerns about these activities of Ms Walker's visitors known to the Defendant in writing and by telephone and in meetings with agents of the Defendant.
29. **As to (b) above**
- At no point in the relevant period did the Defendant initiate any legal proceedings against any of the visitors to flat 14 to prevent them trespassing in the trench' and/or engaging in nuisance-causing behaviour when in 'the trench', or on the external entrance area to the block, or in the block's internal communal areas.

30. At no point in the relevant period did the Defendant take any steps to modify the external entry area to the block or to obstruct access to ‘the trench’ area to prevent visitors to flat 14 from trespassing in ‘the trench’ outside the Claimant’s flat.”

We considered that Octavia’s failure to block access to the trench was perhaps our strongest card, as it rested more or less on all-fours with the analysis offered in *Hilton v James Smith*.<sup>13</sup> In that case, the nuisance was caused by visitors parking their cars in a private road (in the possession) of James Smith in a way which blocked tenant’s access to their own parking spaces. Ormrod L.J. offered us a helpful example of a simple work of improvement to the defendant’s land to abate a nuisance caused by trespassers:

“There was at one stage a suggestion that some of the obstruction was caused by strangers who found it convenient to park their cars in the private way because they were not permitted to park in the street, but that difficulty, as the learned judge found in his judgment (and I quote him), was fairly easily obviated by placing in the entrance one of those hinged posts which can be locked in position and unlocked by those who have a key.”

A railing across the entrance to the trench would have been similarly easy to install and similarly effective in its result. In the circumstances of this case, we continued, that was the most obvious of several reasonable steps for Octavia to have taken:

- “32. The Claimant avers that once it had become apparent—as it had done by at the latest early 2004 — that the nuisance-causing activities of Ms Walker’s visitors were substantial and continuing, it was reasonable in the circumstances to expect that the Defendant would have promptly taken the steps itemised at paras 29–30 above. The relevant circumstances are—inter alia :
- (a) The Claimant was not in possession of any the land from which the nuisance emanated, and so could not pursue any proceedings in trespass against the persons causing the nuisance;
  - (b) The Claimant had no lawful entitlement to effect works to block access to ‘the trench’;
  - (c) The Defendant is a registered social landlord, with substantial financial resources and ready familiarity with available legal remedies;
  - (d) The detrimental effect of the nuisance on the amenity of the Claimant’s flat was very substantial;
  - (e) The Defendant had expressly covenanted with tenants of the block to guarantee their quiet enjoyment of their respective homes;
  - (f) The prompt (i.e. early 2004) blocking of access to ‘the trench’ would have substantially reduced the detrimental impact of the behaviour of Ms Walker’s visitors on the amenity of the Claimant’s home.
  - (g) The financial cost of blocking of access to ‘the trench’ would have been insubstantial to the Defendant given the Defendant’s financial resources.
33. The Claimant accepts that, in response to the Claimant’s complaints about the nuisance caused to her, the Defendant eventually instigated proceedings to obtain and thereafter enforce a warrant of possession against Ms Walker.
35. It was not in the circumstances reasonable for the Defendant to seek to address the nuisance caused to the Claimant by Ms Walker’s visitors solely by means of legal proceedings for against Ms Walker ... because, inter alia:
- (a) The majority of the nuisance was caused by persons other than Ms Walker;

<sup>13</sup> *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 E.G.L.R. 44.



- (b) The time-scale required for the initiation and conclusion of proceedings against Ms Walker was likely to be substantial, during which time the nuisance would continue unabated ...
- 36. As a result of the Defendant's failure to take reasonable steps prevent the nuisance-causing activities of visitors to flat 14, the Claimant suffered throughout the period September 2003 to May 2007 a substantial diminution in the amenity of her flat.
  - (i) **PARTICULARS**

The Claimant was scared to open her front (lounge) window and even to open her curtains on the said window because of the threatening presence of trespassers in 'the trench'.
  - (ii) The Claimant was frequently woken during night-time hours by visitors to Ms Walker.
  - (iii) The Claimant was frequently intimidated and threatened by trespassers on the property.
  - (iv) Litter and debris was frequently left in the communal areas;
  - (v) The security of the block was frequently compromised by the habit of visitors to Ms Walker leaving the entrance door to the block open;
  - (vi) The Claimant had no confidence that her mail would not be intercepted by visitors to Ms Walker's flat."

In a doctrinal sense therefore the claim was a very conservative one. It was no more than an assertion that this particular set of facts fell squarely within the boundaries of the *Sedleigh-Denfield* principle. Terri's financial means were such however that if the claim was to proceed it would have to be funded by the Legal Services Commission ("LSC"), Terri was however in receipt of public funding and Simon and I had thought very carefully about the justification for bringing the claim. While we thought the legal merits of the claim were clear, that alone would not suffice to justify a grant of public funding.

Terri's claim was simply for damages. Octavia had eventually brought possession proceedings against Ms Walker on the basis of the anti-social behaviour of her and her visitors and—after some years—succeeded in evicting her. Terri had been Octavia's principal witness in the case. Given that the troublesome Ms Walker and her even more troublesome visitors had departed the scene, the claim was in no way concerned with curtailing an existing threat to Terri's peaceful enjoyment of her home, which would have made public funding much more obviously justifiable. In a claim which is just about money, the Legal Services Commission applies a quite stringent cost-benefit analysis. The relevant provision of the LSC's Funding Code was para.5.7.3:

#### "5.7.3 Cost Benefit—Quantifiable Claims

If the claim is primarily a claim for damages by the client and does not have a significant wider public interest, Full Representation will be refused unless the following cost benefit criteria are satisfied:

- (i) If prospects of success are very good (80% or more), likely damages must exceed likely costs;
- (ii) If prospects of success are good (60%–80%), likely damages must exceed likely costs by a ratio of 2:1;
- (iii) If prospects of success are moderate (50%–60%), likely damages must exceed likely costs by a ratio of 4:1."

The claim appeared to us to fall within cl. (i). Our claim for damages assumed that the flat had essentially been value-less to Terri for the best part of four years, and that an appropriate award would therefore be

four years worth of rent; some £15,000–£20,000. However we felt the claim also served a wider public interest, inasmuch as it rested on the reassertion of a basic common law principle the effect of which had been rather obscured by prevailing (incorrect) assumptions about the ratios of *Mowam* and *Hussain*.

In reaching that decision, we also took the view that the trial would not take very long. In a nuisance claim, one would usually expect a good deal of the court's time to be taken up with hearing (over several days) hotly contested evidence about the nature of the nuisance and its impact on the claimant. In Terri's case however, the nuisance that she relied upon against Octavia was precisely the same nuisance that Octavia had relied upon against Ms Walker in the possession proceedings.<sup>14</sup> Indeed, Terri's witness statement in this action would in large part incorporate the witness statement she had provided for Octavia in those proceedings. And of course, in ordering Ms Walker's eventual eviction the court hearing the possession proceedings had made findings to the effect that Octavia's factual case was made out.

Simon and I had also conducted a site visit to the premises at an early stage to talk and walk through the credibility of a *Sedleigh-Denfield* claim. It was immediately apparent that the "trench" was our strongest card. This was both because the "trench" was the physical source of the most serious nuisance Terri had suffered, and also because it seemed to us very easy for Octavia to have stopped the trench being a source of nuisance by blocking it off with a rail or lockable gate. I chose the label of "the trench" in part because it accurately described the relevant area in a physical sense, but also because I assumed it would carry pejorative connotations to a judge, redolent as it is of the squalour and horror of the Somme.<sup>15</sup> We also made a short movie to exhibit to Terri's witness statement. As well as giving a visual description of the layout of the premises, the movie provided Simon with a starring role as: "unwanted visitor standing in trench making threatening faces through Terri's lounge window".

Prior to issuing proceedings, we also tested out the legal basis of the claim in a seminar organised by the Housing Law Practitioners Association and hosted by Paul Ridge at Bindman Solicitors. Nothing we encountered there suggested our claim was conceptually problematic. The case would turn we assumed, on how good a job we could do in evidential terms of convincing the court that it would indeed have been reasonable for Octavia to take the steps we averred it should have taken. That assumption proved a little simplistic.

## A defence

Octavia is not an especially large housing association. It has roots in the pioneering work of its founder Octavia Hill in the later nineteenth century.<sup>16</sup> It describes itself as: "a forward thinking, not-for-profit organisation with a strong track record in social housing and providing care services".<sup>17</sup> It submitted a defence to Terri's claim which rested primarily on two arguments. The first—a question of fact—was that the nuisance had not even occurred: Terri was put to strict proof of all her assertions about the behaviour of Ms Walker's visitors and its impact on her. The second—a question of law—was that Terri simply had no cause of action.

### *Had there been a nuisance?*

We were a little surprised—to put it mildly—that Octavia denied the occurrence of the events which were the basis of its successful possession case against Ms Walker. But we did not think the court would need

<sup>14</sup> Because Ms Walker qua tenant was responsible under the terms of her tenancy and the Housing Act 1988 for nuisance and anti-social behaviour caused to neighbours by her visitors, much of the evidence Octavia had invoked against her concerned the actions of those visitors; and especially those visitors' use of the "trench".

<sup>15</sup> Which is not to suggest judges are terribly old, but rather that they are familiar with the imagery and history of World War One.

<sup>16</sup> See <http://www.octaviahousing.org.uk/> [Accessed October 22, 2012].

<sup>17</sup> See <http://www.octaviahousing.org.uk/aboutus/> [Accessed October 22, 2012].

to spend much time in concluding that this aspect of the defence was misconceived. In our skeleton argument, we made the following observations:

- “3. The Defendant denies (Def para 22) that the Claimant suffered such damage. The Claimant refers the court to her own evidence (CWS; bundle pp.27–41) in this matter. The Claimant further observes that she was requested by the Defendant to file witness statements on two occasions in support of the Defendant’s attempts (which were eventually successful) to gain possession of Flat 14 Whitehill House from its then tenant, a Ms Walker, on the grounds of anti-social behaviour by Ms Walker and ‘visitors’ to Ms Walker. (These visitors” are the third parties referred to at para.1 above). The substance of those witness statements is in the Claimant’s submission wholly consistent with the assertions that she makes in this case.
4. The statement of 11.03.2005 is at bundle pp.99–103. On 30.06.2005, Cath Vadia of the Defendant (bundle pp.229–230) wrote to the Claimant stating inter alia:

‘I am writing to thank you for all the time and effort you have put into the above case over the last few months and for your keeping us informed of all incidents as they occur. I appreciate that it has been a very frustrating and demanding time for you and the other tenants.’

Ms Vahda acknowledged in the letter that:

‘Nearly all the allegations of nuisance in some way have involved the behaviour of Ms Walker’s visitors.’

5. The Claimant finds it most surprising in these circumstances that the Defendant denies that the Claimant suffered any damage. Para 22 of the Defence puts the Claimant to strict proof of any damage. In consequence the Claimant has had to file in these proceedings several hundred pages of correspondence between the Claimant and Defendant and internal documents of the Defendant (all of which are obviously well-known to the Defendant) which chart the nature of the nuisance between late 2003 and the summer of 2007.”

Compiling the bundle was obviously a quite time consuming and expensive business, and one that seemed completely pointless in the circumstances. Our best guess as to the defendant’s motives was that this was simply a knee-jerk reaction to deny everything without any real thought having been given to whether the denial was soundly based.

### *A very unusual witness statement*

Octavia’s legal argument was also a bit surprising. Rather oddly, the defence was accompanied by a lengthy “witness statement” written by a solicitor which in substance read like a skeleton argument. The key assertion Octavia made (variously in the witness statement and its subsequent skeleton argument) was expressed in various ways:

“The claim concerns the assertion that the Defendant is liable in damages for the anti-social behaviour caused by its former tenant, a Ms Walker ...

The basis for the claim in nuisance is, without merit. The only circumstances in which a landlord is liable for the nuisance of his tenants is if he has authorised the nuisance ...

[*Sedleigh-Denfield*] has no relevance to the present case because it is followed by a long line of authorities which consider the extent to which the principle can be extended to render a landlord [sic] for the actions of his tenants.”

Octavia presumably misunderstood Terri's claim. We felt we had made it perfectly clear in our pleadings that we had no interest at all in Ms Walker qua tenant, and no interest at all in any activities emanating from land of which she was in possession. What Octavia seemed to be asserting was that because the presence of the "visitors" on Octavia's land was "caused" by Ms Walker qua their putative hostess, and because Ms Walker was a tenant of Octavia, then Octavia were absolved of any legal responsibility for anything those visitors might do on Octavia's land. This seemed a quite bizarre proposition; and if "correct", one that could only be reached by the House of Lords overturning *Sedleigh-Denfield*. The defence rested perhaps on a basic misunderstanding of the law of nuisance; namely that it was a "people" tort rather than a "land" tort.

### *A (very) belated strike-out application*

The claim was issued in November 2008, and subsequently set down for trial in the Lambeth County Court in July 2009. In the interim, Simon and I went about the usual process of discovery of documents, drafting and exchange of witness statements and the preparation of cross-examination schedules and a skeleton argument.

Then shortly before the trial Octavia filed a strike out application on the basis that we had no cause of action. The strike out simply reiterated the legal argument made in the defence/witness statement. The timing of the application was also odd. The point of a strike out procedure is to provide a mechanism for legally unmeritorious claims to be dismissed before any significant sum is spent preparing for the evidential matters that a full trial of the issue might entail. Octavia had waited some six months, during which time we had spent—as had Octavia—quite a lot of money in preparing for a factually contested trial. Indeed, Octavia served a schedule of costs which ran to almost £10,000. The costs schedule came with a threat that Octavia would pursue a wasted costs order when it succeeded in its application—presumably both against Miles and Partners and me:

"... [W]e regard the law in respect of this matter as so settled that we intend to seek an order at the hearing for our client's wasted costs in this respect."

### **The judgment in the County Court**

So we came shortly afterwards before H.H. Judge Gibson in the Lambeth County Court. His Honour was seemingly rather puzzled by the defendant's views on the laws of nuisance. H.H. Judge Gibson produced a short (and for Ms Brumby) very sweet judgment. The salient points were these:

6. The essence of the claim, on which Mr Loveland concentrated, is based on the tort of nuisance.
7. [The Defendant's] argument was based on the context of the alleged nuisance, namely the connection of all of it in one way or another with Ms Walker; and she in the written argument, and Mr King [for the Defendant] in oral argument, relied on authorities to the effect that a landlord is not liable for nuisance created by his tenant unless he has authorised the nuisance. The authorities, in chronological order, are *Malzy v Eicholtz* [1916] 2 K.B. 308, *Smith v Scott* [1972] 3 W.L.R. 783, *Hussain v Lancaster City Council* [2000] Q.B. 1 and *Mowan v Wandsworth LBC* (2001) 33 H.L.R. 616. In each case the claim was founded on the acts of tenants and members of their households. In Mowan the attempt was unsuccessfully made to rely on Article 8 of the Convention as a basis for departing from the well-established rule.
8. Mr Loveland did not attempt to gainsay the principle derived from these authorities. But he said that they deal with a situation which is not alleged by Ms Brumby. Although the creators of the nuisance were connected with Ms Walker in that they were actual or aspirant visitors

to her flat, none of them were part of her household; and none of the acts complained of was committed on any part of Ms Walker's demise. Mr Loveland submitted that an allegation that Octavia Hill is liable for Ms Walker's acts and omissions is not part of Ms Brumby's case. This is shown by paragraph 22 of the Particulars of Claim: ...

So this case now concerns activities on land unequivocally in the possession of Octavia Hill, albeit some of it (the path leading to the front door and the common parts within the block) is necessarily subject to express or implied licences to enable tenants and those legitimately visiting them to obtain access to the areas which are the subject of individual demises.

9. Mr Loveland submitted that once the irrelevance of authorities relating to alleged liability for nuisance created by tenants is demonstrated there is nothing to take Ms Brumby's case outside the ambit of the tort of nuisance as described in *Sedleigh-Denfeld v O'Callaghan* [1940] AC 880. He relied in particular on a passage in the speech of Viscount Maugham at p.894:

'The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g. by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words continues or adopts" are defined. In my opinion an occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so.'

Mr Loveland also cited passages in the speeches of Lord Atkin (at p.897) and Lord Wright (at pp.904–905). He submitted, by reference to *Page Motors Ltd v Epsom and Ewell BC* (1982) J.P.L. 572, that an action in nuisance may be based on the behaviour of human beings, no less than on the presence of removable artefacts or manageable natural phenomena, on a defendant's land.

- 10.1 did not find [counsel for the Defendant] to have an answer to this; and the objection that Octavia Hill cannot be liable for the defaults of Ms Walker simply misses the point as to what Ms Brumby is—and what she is not—alleging."

Octavia's solicitors were correct in one sense in their wasted costs threat: the law in this area was indeed "settled"; it just happened to be firmly settled in Terri's favour. Rather than take the case to trial however, Octavia chose to appeal against the dismissal of their strike-out application.

## In the High Court

The case came before Mackay J. in May 2010.<sup>18</sup> Neither we nor Octavia had altered our arguments on the legal question. Happily for Terri, Mackay J. did not seem to be any more attracted to the defendant's position than H.H. Judge Gibson had been.

- "10 The claimant's case is put simply therefore this way. This defendant was both owner and occupier of the approach and entrance to the flats, the common parts within and the trench. The claimant alleges that she made frequent complaints about the activities of the trespassers and puts forward certain steps that could, she says, reasonably have been taken to abate the nuisance such as for example barring access to the trench by some physical barrier or gate. Whether these propositions are indeed reasonable would be for the trial judge to determine having heard all the evidence. But the cornerstone of Mr Loveland's argument is that the key to the defendant's liability is its occupation of the land from which the nuisance emanated.

<sup>18</sup> *Octavia Hill Housing Trust v Brumby* [2010] EWHC 1793 (QB).

That is because the very nature of the tort of nuisance is that it is founded on the use of land in such a way as to diminish the enjoyment of another land owner. It also explains, he says, why it has been held, as is common ground between the parties, in numerous cases that where land is let by a landlord to a tenant the landlord is not liable for acts of nuisance permitted by his tenant unless he has specifically authorised them.

- 13 Miss Bretherton's argument turns on the assertion that for there to be a cause of action here there must be something more than the mere existence of anti-social behaviour on the defendant's land, and that a mere failure to abate the nuisance is not in itself enough. In this case the defendants did nothing positively to encourage or adopt what the trespassers were doing but at worst merely failed to take active steps to make physical alterations to the dwelling house by fencing off the trench, installing an entry phone, installing a locked mail box and the like. She argues that there is no reported example in the cases of such a failure as this leading to the conclusion that the land owner was responsible for the acts of trespassers.
- 14 Mr Loveland says one example is the case of *Hilton v James Smith* [1979] 2 E.G.L.R. 44, a Court of Appeal decision, where there was liability attaching to a landlord who did no more than do nothing to prevent the other tenants in the row of shops and/or trespassers blocking the private roadway over which all the tenants enjoyed a right of way in such a way as to deprive the claimant whose shop was the last in the row, of all access. In so far as, in the past at least, trespassers had caused this problem that was, the court held, fairly easily obviated by placing at the entrance a hinged post which could be locked in position. But on a perusal of the facts of the case, that the landlord was guilty of no more than mere passive inaction was clear, and yet it was fixed with liability. As Ormrod L.J. said:

'There comes a stage when standing by and not doing anything about the obstruction over which the occupier has complete control and of which he is fully aware it would be possible to say that he himself was obstructing. But I do not think that we need go that far. All that we need say is that on the facts here found to be proved by the learned judge the plaintiffs bring themselves fairly and squarely within the terms of the dicta which I cited from *Sedleigh-Denfield*.'

- 15 ... Mr Loveland argues that this is because of the very nature of the tort of nuisance, dependant as it is on the use of land rather than the actions or the persons responsible for them which cause the nuisance.
- 16 In an application of this nature, proceeding as it does on assumed facts, the question of whether the claimant has a real prospect of succeeding at trial in proving that this defendant, as owner and occupier of the parcels of land from which the acts of nuisance came, ought to be found to have continued or adopted those acts by failing to take reasonable steps to prevent or abate them is an acutely fact sensitive issue and will depend on the view the judge takes of the evidence he hears. But I am satisfied that the liability in tort of the defendant can, given a favourable view of that evidence, be established and the claim is not shut out by the category of case exemplified by *Smith v Scott* and *Hussain v Lancaster City Council*. I would uphold the decision of the judge below and dismiss this appeal."

Octavia then sought permission to appeal to the Court of Appeal. Its application was rejected as totally without merit.

## Conclusion

The High Court judgment attracted quite a lot of interest in legal blogs.<sup>19</sup> Some of the comment was very sensible, but some of it was rather wild. One of the more astute notes appeared on *Nearly Legal*:

“I’m no fan of *Hussain, Mowam* etc and would gladly see them overruled, but, in the meantime, this is a very encouraging way of getting round the problem. Not in all cases, admittedly, but it’s a start. Fingers crossed that Ms Brumby can succeed at trial as well.”<sup>20</sup>

*Inside Housing* gave the case quite a splash:

“Landlords face becoming legally liable for failing to tackle anti-social behaviour on their land after a tenant won a landmark High Court case.

Octavia Housing tenant Terri Brumby has won the right to sue her landlord over claims it failed to take reasonable steps to tackle anti-social behaviour on its land.

The landmark High Court case could pave the way for further claims by tenants who feel their complaints about neighbourhood nuisance have not been properly addressed, the tenant’s lawyer stated.”<sup>21</sup>

The comment in *Housing and Property Law Daily* suggested that Octavia’s (to us) ill-conceived strike out application was rooted in a more widely shared misunderstanding within the housing law community:<sup>22</sup>

### “High Court approves use of nuisance law to require landlords to tackle problem tenants

Received wisdom was undermined by this potentially significant High Court ruling. The Court held that, in certain circumstances, it is possible for a successful claim for damages in nuisance to be brought against a landlord for failures to tackle what can broadly be termed anti-social behaviour. Due to the conspicuous failure of previous attempts to attach civil liability in such circumstances, many housing lawyers had assumed that social landlords were effectively immune from civil liability for their performance in tackling anti-social behaviour. This ruling shows that to be incorrect.”

Notwithstanding such comments, *Brumby* is not a landmark case in a doctrinal sense at all. It is just a careful application of an old idea to a new set of facts. It seems likely that most neighbour nuisance cases are of the *Mowam* rather than *Brumby* variety. If there is any nuisance at all from land in the possession of the landlord—such as a garden, or a communal staircase—then it is likely to be a lesser source of nuisance than the land leased to the nuisance neighbour. It is equally likely that if a trial on the facts would take up several days then it would be hard to justify public funding for what may be financially a quite small claim.

Those conclusions are probably borne out by the fact that since *Brumby* was reported there has not been a long line of solicitors beating a path to my door to ask me to argue similar cases on behalf of their clients. I have in fact received one brief on the point. And my advice in that case was that there was not a viable claim to pursue. Which, given that it now looks as though I will be spending £9,000 a year to send my children through university, is from a personal perspective, really rather a shame.

<sup>19</sup> In addition to the sources discussed below see, inter alia, comments from Bevan Brittan Solicitors at <http://www.bevanbrittan.com/articles/Pages/landlordliablenuisancetrespasser.aspx> [Accessed October 22, 2012]; *Local Government Lawyer* at [http://www.localgovernmentlawyer.co.uk/index.php?option=com\\_content&view=article&id=3199%3Atenants-claim-that-social-landlord-adopted-nuisance-to-go-to-trial&catid=60%3Ahousing-articles&Itemid=28](http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=3199%3Atenants-claim-that-social-landlord-adopted-nuisance-to-go-to-trial&catid=60%3Ahousing-articles&Itemid=28) [Accessed October 22, 2012]; Landlord Law Blog at <http://www.landlordlawblog.co.uk/2011/03/02/can-landlords-be-liable-to-neighbours-for-tenants-from-hell/> [Accessed October 22, 2012]; Anthony Gold Solicitors at [http://www.anthonygold.co.uk/site/ang\\_articles/ang\\_articles\\_housing\\_law\\_update\\_2010\\_andrew\\_brookes.html](http://www.anthonygold.co.uk/site/ang_articles/ang_articles_housing_law_update_2010_andrew_brookes.html) [Accessed October 22, 2012].

<sup>20</sup> See <http://nearlylegal.co.uk/blog/2010/07/landlord-liability-for-nuisance/> [Accessed October 22, 2012].

<sup>21</sup> See <http://www.insidehousing.co.uk/ihstory.aspx?storycode=651083> [Accessed October 22, 2012].

<sup>22</sup> See <http://www.housingandpropertylawdaily.co.uk/law-library/2011/05/11/high-court-approves-use-of-nuisance-law-to-require-landlords-to-tackle-problem-tenants2--10097.html> [Accessed October 22, 2012].